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No. 10,271

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANDERSON-COTTONWOOD IRRIGATION DISTRICT,

Appellant,

vs.

J. R. MASON,

Appellee.

APPELLANT'S REPLY BRIEF.

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Appellant acknowledges receipt on the 5th day of January, 1943, of copies of the brief of Appellee in the above-entitled case.

The brief does not challenge any of the authorities which we cited in support of the points made in our opening brief, except to say that the case of *In re Woods,* 143 U. S. 202, 12 S. Ct. 417, cited by us does not seem to be in point. As it was cited only by way of illustration, this comment is not important. Although Appellee virtually concedes the soundness of the points made in our brief, he cleverly seeks to avoid their effect by making five points designed to nullify it. In this reply we will review these five points.

I. JUDGE WELSH HAD NO AUTHORITY TO MAKE HIS ORDER OF JULY 1ST.

The first point made by Appellee is that there is no merit in the appeal because Judge Welsh properly granted the order extending time. This is really the main point in the appeal. In our opening brief we showed that under Section 350 of Title 28 U. S. C. the District Court had authority to stay the execution and enforcement of the Final Decree for a reasonable time to enable Mr. Mason "to apply for and to obtain" a writ of certiorari from the Supreme Court, and the cases cited by us in our opening brief clearly held that the District Court had no power to change any of the terms of that Decree.

On pages 2 and 3 of Appellee's brief there is a quotation from Judge Welsh's order to the effect that "the creditors are hereby granted an extension of time to October 31, 1942 within which to deposit their bonds with the Clerk of this Court, instead of July 7, 1942, as provided in the Final Decree". This provision of Judge Welsh's order was quoted in our opening brief to show that the order was not a stay of the execution and enforcement of the Decree but an actual change in its terms. This is the real gist of our appeal, which attacks the order because it did not purport to stay the execution and enforcement of the Final Decree but was an actual change in the substance of the document itself.

Appellee seizes upon the provision in Section 330 of Title 28 U. S. C. to the effect that the Judge of the District Court may make the stay conditional upon

giving a bond to answer for all damages and costs which the other party may sustain by reason of the stay, as a complete answer to our argument that the stay may be granted only for the purpose of enabling a party "to apply for and obtain" a writ of certiorari. He argues that the provision in Section 350 contemplates that a stay may be obtained for the benefit of a person who applies for but *fails* to obtain a writ of certiorari.

There are, of course, situations in which a stay pending an application for a writ of certiorari would cause serious damage to the other party if the writ is not obtained and the law properly makes provision for a bond in such a case. As a matter of fact, Judge Welsh's order was conditioned upon giving a bond in the amount of $500.00 to cover any damages which the District might sustain by reason of the delay in the enforcement of the decree.

As we showed in our opening brief, the provision of the Final Decree to which a stay was particularly applicable was the provision that the Clerk of the Court should notify R. F. C. that money was available in the registry of the Court for the purchase of refunding bonds of the Irrigation District (R. 8). This provision and the time limit could have been stayed by a proper order of the District Court, but, as we showed in our opening brief, the District Court had no power whatever to modify the terms of the Final Decree which the Circuit Court of Appeals had affirmed, by making a new time limit. The decision of the Circuit Court of Appeals was a final and conclu-

sive determination that the time limit in the Final Decree was proper, and no subsequent action of the District Court or any other Court except the Supreme Court of the United States could change it. The District Court had authority to stay the enforcement of the time limit pending the application for a writ of certiorari, but when the application for the writ was denied and the petition for a rehearing in the Supreme Court was denied, there was no reason for any further stay of proceedings and the decree again became in full force and effect. If the writ of certiorari had been granted and the decree had been modified, then Mr. Mason would have been entitled to all the benefits of the modified decree, but as his application for a writ of certiorari was twice rejected by the Supreme Court he has no basis whatever for his contention that after his petition for certiorari had been conclusively rejected he can now come in and present his bonds for payment.

II. QUESTION IS NOT MOOT BECAUSE OF JUDGE HEALY'S ORDER.

The second point made is that the question presented is moot because of the order of Judge Healy extending the time for the deposit of bonds.

This point is made apologetically and is refuted by the terms of the order itself. The order is set forth in full on page 16 of the record and provides that the running of the time within which Appellant may present his bonds and coupons to the registrar for

payment "is suspended until and for a period of 60 days after the United States Supreme Court 'shall have passed upon' applicant's petition for writ of certiorari, or if such writ be granted, until a period of 60 days after the Final Decree shall have become final". The United States Supreme Court denied the writ of certiorari on the first day of June, 1942 (R. 17). This certainly was the time when the Supreme Court "passed upon" applicant's petition for certiorari, and this is virtually conceded by counsel for Mr. Mason on page 9 of their brief. Therefore, passing the question as to the authority of a single Judge of the Circuit Court of Appeals to extend the time for the deposit of bonds without an action by the Court staying its mandate confirming the Final Decree, there is obviously no merit in the second point of Appellee herein.

III. MR. MASON'S DEPOSIT OF HIS BONDS WAS INEFFECTIVE.

The third point of Appellee is that the appeal presents a moot question because Mr. Mason had deposited his bonds within the time prescribed, and the motion of Appellee to modify the supersedeas order and to require the clerk of the Court below to pay Mr. Mason for his bonds should be granted.

It is true that on July 3, 1942, Mr. Mason addressed a letter to the clerk of the District Court and accompanied that letter with the bonds in question here and certain appurtenant coupons and on the same date

received from the clerk of the Court a receipt for the bonds and the coupons. It was expressly provided in this letter as follows:

> "No transfer of the title to any bonds or coupons handed you herewith is effected or consented to by this deposit, and I decline to take the money payable by you under the said Final Decree at this time, and protest the said Final Decree in so far as the same is not final but possibly none the less operative, and if as a result of the Petition for a Rehearing the said Final Decree should be reversed, I intend to, and will claim each and every right that I am entitled to under and by virtue of my ownership or possession of the above listed bonds and coupons, and you shall return to me or my order these securities, on demand."

This was obviously not a deposit in compliance with the Final Decree, which contained the following provision (R. 7 and 8):

> "(b) That the sum of Twenty-four Thousand Seven Hundred Ninety-Nine and Fourteen/100 Dollars ($24,799.14), paid in to the registry of this Court by the Disbursing Agent, be disbursed by the Registrar for the purpose of taking up and retiring and refinancing, in accordance with the plan of composition approved in this cause, such remaining outstanding old obligations of the petitioning district as are affected by the plan of composition, and which may be presented to the Registrar for that purpose within the period of twelve (12) months from the date hereof; that all such obligations so presented and paid for, be forthwith cancelled and returned to the petition-

ing district by the Registrar; that all such outstanding old obligations of the petitioning district which are not so presented to the Registrar within twelve (12) months from the date hereof shall thereafter be forever barred from participating in the plan of composition or in the funds held in the registry of this Court."

The third point also includes an argument in favor of the granting of the Motion of Appellee, printed as an appendix of his brief, to modify the supersedeas order and to require the Clerk to pay Mr. Mason for his bonds.

It is argued that certain cases on alternative relief justify such an order. We confess inability to see where these cases are in point and will therefore defer consideration of them and of this part of the argument until the case is called for oral argument, remarking only that we see no merit in the motion.

IV. APPEAL SHOULD NOT BE DISMISSED.

The fourth point is that the appeal was not properly taken and should be dismissed.

The burden of this argument is that Section 24 of the Bankruptcy Act as revised in 1938 was not intended to permit an appeal from an order of the type here involved because that order is discretionary, and unless an abuse of discretion is shown an appeal will not lie.

In our opening brief we showed that the order of Judge Welsh was beyond his jurisdiction; that the

judgment of the Circuit Court of Appeals affirming the Final Decree was a conclusive determination that the terms of the Final Decree were binding upon Mr. Mason and that no Court had a right to change, in any particular, the terms of that decree except the Supreme Court of the United States. Accordingly the authorities cited in the discussion of the fourth point of the Appellee are not in point because there is no question of the abuse of discretion, but it is a question of the jurisdiction of the District Court to make an order of the kind which was made on July 1, 1942.

V. SECTION 83e OF CHAPTER IX OF THE BANKRUPTCY ACT IS NOT APPLICABLE.

The fifth point is that the appeal and the proceeding in the Supreme Court for Writ of Certiorari extend the 12 months limit. This is based on the provision of Section 403(e) of Title 11 U. S. C. (Section 83e of Chapter IX of the Bankruptcy Act), that when an appeal is taken from the *Interlocutory* Decree, if the Decree prescribes a time within which any action is to be taken, the running of such time is suspended during an appeal until final determination thereof. It is conceded that there is no such provision affecting a final decree but it is argued that the same principle should apply. There is no merit in this point. If Congress wanted to make such a provision applicable to Final Decrees, it should have done so. We have shown in our opening brief that Mr. Mason had ample opportunity to present the question of the

propriety of the time limit to the Circuit Court of Appeals and did not do so in a proper manner and the Circuit Court of Appeals expressly refused to consider the point when it was made at the oral argument and confirmed the Decree with the 12 months time limit. Mr. Mason deliberately refused to deposit his bonds within the time limit prescribed by this Court. His determination so to proceed was doubtless made in the faith that his petition for rehearing of his application for a writ of certiorari would be favorably considered by the Supreme Court. It was not so considered, and he must now take the consequences of his misguided faith.

Dated, Stockton, California,
January 15, 1943.

Respectfully submitted,
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Attorneys for Appellant.